Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN J. METCALFE, III,

Petitioner,

vs.

CYNTHIA U. KELLY f/k/a CYNTHIA U. METCALFE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ON ISSUE RAISED

Mr. Metcalfe was not denied due process in that the Guardian Ad Litem specifically advised as to his sources, including everyone he had spoken to and interviewed. Mr. Metcalfe had the opportunity to depose and seek production from same. He didn't.

STATEMENT OF THE CASE

Mrs. Kelly, the mother of twin boys, filed a Petition for Change of Custody in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Family Division. The trial court entered its Final Judgment granting Mrs. Kelly's Motion for Change of Custody (Appendix B to the Petitioner's Petition for Certiorari). That decision shows, on its face, that the trial court, based upon all of the testimony of, *inter alia*, the Guardian Ad Litem, the experts, the Home Study Evaluators, parties and family members that there was a substantial and material change in circumstances such that it would greatly promote the children's best interest to live with Mrs. Kelly.

There is little in the Petition herein which reflects the record made at the trial court level. It is, however, unnecessary to turn to that record or to rebut the rhetoric upon which the assertions of error are predicated. It is sufficient to note that this was, indeed, an action for change of custody of the children based upon substantial and material change in circumstances.

The trial court heard that the mother became stable and created a nurturing and loving home environment for the children. On the other hand, not only did Mr. Metcalfe remarry, get divorced, have another child and was unemployed, but more importantly, Mr. Metcalfe was dysfunctional and his behavior bizarre.

Mr. Metcalfe appealed to the Florida Third District Court of Appeal who, not only confirmed *pre curium* (Appendix A to the Petitioner's Petition for Certiorari), but also directly addressed Mr. Metcalfe's due process argument. The appellate court stated that due process had not been violated especially since the Guardian Ad Litem disclosed from, day one, whom he had interviewed.

The Supreme Court of Florida declined to accept jurisdiction.

REASONS FOR DENYING THE WRIT

The gravamen of the Petitioner's position in this cause is his claim of denial of due process and of a fair trial. His sole basis is that he was not allowed to depose the Guardian Ad Litem. That is the law in Florida. It is clear from the Guardian Ad Litem's report that his sources were clearly identifiable. Metcalfe could have obtained the information directly from the sources' mouths rather than second hand from the Guardian Ad Litem. The fact of the matter is that Metcalfe knew that deposing the sources would not benefit his case and, thus he chose to defend by attacking the messenger rather than the message.

The District Court of Appeal of Florida, Third District confirmed the decision of the trial court because it found that the material factual findings upon which the Final Judgment was based were clearly correct as tested by the standards. Further, the District Court's construction of the Florida law is consistent and reasonable. This Petition, therefore, presents to this Court no conflict of decisions, state or federal, and no actual departure from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Neither does that decision raise an important question of

federal, or indeed, state law which has not been, but should be, settled by this Court. Metcalfe is only dissatisfied with the fact that he no longer has his children to abuse. His rhetoric to the contrary, notwithstanding, the judgment of the Florida Appellate Court protects only the parties to that judgment and makes no change in the manner in which the Florida law has been construed since its enactment.

ARGUMENT

The cases cited in Metcalfe's Petition do not address the point. In the main, the cases referred to the right to cross examine an examiner, case worker, home study worker, etc. Metcalfe had that right. He also had the Guardian Ad Litem's report and did, indeed, cross examine the Guardian Ad Litem at trial.

The Petitioner cites *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), a due process case that has nothing factually relative with this cause. As the Petitioner stated in his Petition, *Stanley* talks about a father being entitled to a hearing concerning his fitness as a parent. Metcalfe had that.

All of the other cases cited by the Petitioner are also not on point. *Bass v. Bass*, 437 P.2d 324 (Alaska 1968), ruled that considering the report of the child welfare worker in a custody case is not error. *Fewel v. Fewel*, 144 P.2d 592 (Cal. 1943), held that an investigator is subject to cross examination. *Anderson v. Anderson*, 445 P.2d 397 (Colo. 1968) (en banc), held that the statute permitting use of a probation department report was correct. *Yearsley v. Yearsley*, 496 P.2d 666 (Idaho 1972), said a report must be made in open court with the right of cross examination. *Fisher v. Devins*, 200 N.W. 2d 28 (1972), stated that a party was entitled to cross examine the probation officer who wrote a report. *In re: The Marriage of Kramer*, 580 P.2d 439 (Mont. 1978), found it was error to exclude a report of a county

welfare department and to limit the testimony of the investigator. *Roberts v. Roberts*, 226 S.W. 2d 579 (Ark. 1950), would not let in a report unless the preparer testified. *Malone v. Malone*, 591 P.2d 296 (Okla. 1979), states that an investigator must submit to cross examination. *Thorlaksen v. Thorlaksen*, 453 N.W. 2d 770 (N.D. 1990), permitted the use of a home study report so long as the husband could cross examine the preparer. *Schmitz v. Schmitz*, 351 N.W. 2d 143 (S.D. 1984), stated it was proper to admit a home study report even containing hearsay. *Larson v. Larson*, 140 N.W. 2d 230 (Wis. 1966), held that use of reports by welfare personnel was within the sound discretion of the court. Nothing in any of these cases conflict with the decision of the trial court herein.

There was enough before the trial court about Metcalfe that even excluding the Guardian Ad Litem's report and testimony, the trial court had more than enough testimony and information before it to decide in favor of Mrs. Kelly. In fact, the facts were overwhelming. Truth be told, every witness save for Petitioner's hired gun, testified against him. The court appointed expert was so fearful as to how her dysfunctional findings would upset Mr. Metcalfe, that she did not want to put them on record. The trial court heard from everyone and made its decision.

Mr. Metcalfe is incorrect in his assertion that Florida case law supports his position. To begin with, the Guardian Ad Litem is one who is appointed as an officer of the court, not as a party to the action. The Guardian Ad Litem is much like a minor bring suit by his "next friend". The "next friend" is an officer of the court making but a special appearance to look after the interest of the ward. *Youngblood v. Taylor*, 89 So. 2d 503 (Fla. 1956).

Since the Guardian Ad Litem wasn't a party nor a witness, information and documentation which he gathers, is his work-product. If one looks at the cases cited by the Petitioner, both

before the Florida Appellate Court and before the Court herein, one finds that they concern themselves with the HRS workers, home study and social investigation, testimony and reports, not a Guardian Ad Litem who effectively stands in the shoes of the children and acts for the court.

The Florida courts have long held that it is error to prohibit the right of cross examination of a case worker as to the case worker's skills in preparing a report.

Mr. Metcalfe could have, but chose not to, depose, *inter alia,* the home study people. It is a given that the court can't conduct its own investigations and appoints a Guardian Ad Litem to assist in so doing. Had the court done the investigations itself, could the court be subject to production requests and being deposed? I think not.

Unbelievably, the Petitioner cites *Kern v. Kern,* 333 So. 2d 17 (Fla. 1976). In *Kern,* the Florida Supreme Court held that notwithstanding technical rules, that it is constitutional for a court to consider reports containing hearsay and other inadmissible opinion statements, and that admitting the report, was not a violation of law. *Kern* also stands for the long held position that:

> . . . the credibility of witnesses and the weight of their testimony is best determined by the trial court, fact findings made by trial judges in custody hearings should be accorded great weight.

and

> It has been held that, so long as such reports or description of contents thereof were made

> available to the parties, there is no violation of due process guarantees. . . . In the instant case, nothing prevented Mrs. Kern from calling as witnesses, the case workers who prepared the reports, as well as the persons whom they interviewed.

It was true in *Kern* that nothing prevented the wife from calling a case worker as a witness. Nothing prevented Mr. Metcalfe from doing likewise, or deposing same.

The Petitioner fails to cite *Leinebach v. Leinebach*, 634 So. 2d 252 (Fla. 2d DCA 1994), wherein the Guardian Ad Litem submitted a report recommending a change of custody. The trial court errored in entering an order without a hearing relying solely on the report. The appellate court made it clear that there was a difference between the social investigative report and one of a Guardian Ad Litem. The appellate court stated that the statute was clear that the parties should have an opportunity to read the contents of the report prior to the entry of any Final Judgment or Order. The respondent heartedly agrees. In the case at bar, the Guardian Ad Litem's report, was dated January 14, 1993, and the last day of trial was on August 11, 1993. The Final Judgment was entered on September 30, 1993.

The trial court did nothing more than make its finding of facts and properly acted upon same. The appellate court did nothing more than exercise its appropriate appellant function in determining that the Final Judgment below was properly entered. Mrs. Kelly is content to rely upon trial and appellant court's opinions as her best advocate in opposing the Petition herein.

Mr. Metcalfe was not denied due process. His sole basis for even making the claim, is based on the Florida court's denial of

his appeal to overturn an order changing custody. He lost on the merits. Nothing can change that fact.

Mr. Metcalfe was afforded every opportunity to make discovery. The Guardian Ad Litem specifically advised as to whom he contacted and interviewed prior to arriving at his opinion. The Guardian Ad Litem specifically stated in his report, Appendix A, pp. 1a-7a, *infra*, that he had interviewed and spoken with the following:

(1) The Parties.

(2) Mrs. Cynthia *Lee* Metcalfe (his subsequent wife).

(3) The children's pediatrician.

(4) The children's day-care personnel.

(5) The children's elementary school personnel.

(6) The maternal grandparents.

(7) The Home Study investigator assigned to the Kelly home.

(8) The Home Study investigator assigned to the Metcalfe home.

(9) The Court appointed psychologist.

(10) The counsel for the parties.

(11) The children themselves.

The Guardian Ad Litem further attended the depositions of the parties and expert witnesses. He also reviewed the children's various medical and school records.

Mr. Metcalfe was free to depose and seek production of all of the above. He chose not to. The only depositions taken by Mr. Metcalfe were of Mrs. Kelly and the expert witness. Mr. Metcalfe *did not even attempt* to depose nor get production from anyone else save for the Guardian Ad Litem.

The trial court's decision was not arbitrary. The record is clear that the court appointed psychologist found Mr. Metcalfe to be a dysfunctional person in need of help. The mother's expert witness opined as to the children's emotional problems resulting from turmoil in their father's home. Cindy *Lee* Metcalfe, the father's subsequent wife, told of Metcalfe pulling his son out of the car and driving away, repeated corporal punishment and of locking the children in their bedroom when there was a fire in the kitchen. Additionally, custody and the evaluations adoption specialist, Barbara Pope, advised of the children's problems, their being programmed and about parental alienation by Mr. Metcalfe. (*See* Appendix B,pp. 8a-15 a, *infra*, for excerpts of Mrs. Kelly's brief below quoting from testimony given).

CONCLUSION

It is respectfully submitted that the Final Judgment changing custody to Mrs. Kelly be upheld. Mr. Metcalfe had sufficient notice, time and opportunity to take discovery and to present his case. The record clearly shows a sufficient basis for a change of custody. Nothing can change the fact that the best interest of the children have been promoted by the change in custody to Mrs. Kelly, with whom they have now lived for the past two and a half years.

This Honorable Court should deny review.

Respectfully submitted,

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APPENDIX A — REPORT AND RECOMMENDATION OF GUARDIAN AD LITEM

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO.: 87-16362 (FC 07)

IN RE: THE MARRIAGE OF:

CYNTHIA U. METCALFE,

Petitioner,

and

JOHN J. METCALFE, III,

Respondent.

REPORT AND RECOMMENDATION OF GUARDIAN AD LITEM

Guardian ad Litem, Richard C. Milstein, having been appointed by this Court in order to represent the interests of the minor children, Robert Metcalfe and David Metcalfe (collectively "the children"), hereby accepts his appointment as Guardian ad Litem and makes the following report and recommendation to the Court:

1. The undersigned was appointed as the Guardian ad Litem in this cause on October 18, 2991, as a result of the

apparent and real acrimony between the parties which have resulted in prolonged civil litigation. There is now pending a custody and child support petition before the Family Division of the Civil Court in the 11th Judicial Circuit in and for Dade County, Florida.

2. The parties involved in this action are as follows:

(a) John Metcalfe, who resides in a home titled in his mother's name in South Miami, Florida, John Metcalfe is self-employed as a tire broker and earns an annual income of approximately $23,000. He acknowledges financial assistance by his mother for the children and some of his needs.

(b) Cynthia ("Cindy") U. Kelly, resides with her husband, Robert ("Bob") Kelly, in West Palm Beach, Florida. Cindy Kelly is currently employed with Florida Power & Light and has an annual salary of approximately $27,300.

(c) Robert John Metcalfe and David Christopher Metcalfe are twin sons of the parties and were born in Miami, Florida, on October 2, 1986. They currently reside with their father and spend alternate weekends, alternate holidays and one month during the summer with their mother (only the last two summers). They are currently enrolled in Fairchild Elementary School, a Dade County Public School in the kindergarten program.

(d) Virginia Metcalfe, John Metcalfe's mother and the children's paternal grandmother, resides with John Metcalfe and the children. She is the technical custodian of the children since the Court Orders of October and November, 1991 require the children to reside with her. Virginia Metcalfe provides financial

assistance to her son, John Metcalfe, and the children since she makes direct third party payments for the children and pays other expenses for the household.

(e) Robert ("Bob") Kelly, Cindy Kelly's husband, lives with Cindy Kelly and is the children's stepfather. Robert Kelly is currently employed with Florida Power & Light and has been for many years.

(f) Cynthia Lee Metcalfe, John Metcalfe's current wife and the children's stepmother and former nanny, resides with her parents and her infant son, Jordan Metcalfe (natural son of Cynthia Lee and John Metcalfe) in Canada. There have been allegations and, indeed, admissions that Cynthia Lee has suffered from bouts of substance abuse and depression. John Metcalfe has instituted a dissolution of marriage proceedings, which would have appeared to have precipitated the current action between John Metcalfe and Cindy Kelly.

3. The undersigned has interviewed all of the parties in this cause. These interviews were conducted in person except for a telephone conference with Cynthia Lee Metcalfe from Canada with an associate of the undersigned. The undersigned has viewed both homes where the children resided since the proceeding started, met with the children's pediatrician, as well as the children's day school and spoke with the personnel at the daycare center and then at David Fairchild Elementary School. The undersigned has also had telephone conversations with the maternal grandparents, the home study investigator assigned to the Kelly's home, the home study investigator assigned to the Metcalfe home, and the court-appointed psychologist who evaluated the children. Also, the undersigned has conversed at length about the case with both the Kelly's former and current

counsel as well as with John Metcalfe's counsel. The undersigned has reviewed the medical records, school records and various correspondence sent to this office offered by various sources as to the children's condition. The undersigned has also attended the depositions of all of the interested parties and expert witnesses.

4. The undersigned visited with them on several occasions, at their daycare and at the undersigned's offices. Both children appear to be quite outgoing, but have a great deal of underlying issues and problems. The undersigned is somewhat troubled by the children's seemingly programmed answers about their preference among their parents. Both offered, rather mechanically, that they wished to live with their father, and that they preferred their father to their mother.

5. The undersigned has been requested to make a recommendation as to the primary custodial arrangements for these children and as to visitation between the non-custodial parent.

6. After reviewing the Florida Statutes that set forth the guidelines for shared parental responsibility and doing all of the foregoing, discussing the matter with various professionals about these children and their parents, the undersigned makes the following recommendation to the Court:

(a) The two children should remain and be brought up together as siblings since the bond between twins is very powerful and there is no reason for them to beseparated.

(b) Both parents appear to have significant distrust toward each other. The father seems to havemanipulated the

situation to a point where the best interests of the children are blurred by his best interests and to the detriment of the minor children. It appears that the father has attempted to thwart the rights and visitation of the mother with her children at times. There does not appear to be an attempt to add to or extend visitation between mother and children by John, it must be by the schedule. Telephone communication with the children has been made unnecessarily difficult for the mother for a multiple of reasons given by father. The father fails to recognize any problems or faults in the children and has failed to secure appropriate evaluation and counseling for the boys. He denies all imperfection and wants the children to be his without outside influence or input by the mother.

(c) The primary custodial parent should be changed to Cynthia Kelly. The children should reside together with their mother, Cynthia Kelly and her husband Robert Kelly in West Palm Beach, Florida during the school year as defined by the Palm Beach County Public School System. During vacations, including the extended summer vacation, the children together should have visitation with their father, John Metcalfe, as more fully set forth below, and as recommended by mental health care experts, now and in the future.

(d) With regard to visitation, the undersigned would recommend that the non-custodial parent, John Metcalfe, have alternate weekends with the children. If either parent wishes to take an extended vacation or extended weekend vacation, that should be able to be arranged amicably between the parties. Additionally, both parents should be able to be with the children on their respective birthdays or the day immediately before or after in order to celebrate that event; and if not possible, the parents shall alternate the years of celebration on the birthday.

Additionally, the children should be able to spend Father's Day with father and on his birthday as well as to spend Mother's Day with mother and on her birthday. All major holidays should be amicably divided between the parties trying to give equal access and contact between them.

7. The children need a warm and nuturing environment in order to develop and mature into happy and healthy adults. The court-appointed psychologist, in her report and deposition concludes that the children need extensive psychotherapy and psychoeducational evaluation and therapy. John Metcalfe needs to have extensive parental therapy for himself and for his children. Cynthia and Robert will need parenting counseling and therapy to make an adjustment to the role of full time parents. It is imperative that the psychologist's urging be heeded if these children are to enjoy a healthy childhood and adulthood.

8. The children must be insured by the best medical insurance available for them in light of the recommendation of extensive psychological counseling. This cost should be borne by John Metcalfe as well as the uninsured portion of the psychological counseling with all other costs being split equally by the parties for medical expenses. Child support should be awarded n accordance with the child support guidelines of Florida Statutes.

9. The undersigned makes these recommendations to the Court and requests the Court to consider them in its ultimate findings and orders for custody and visitation orders. The undersigned as well as an associate attorney in the office, Aileen M. Ugalde, have continually communicated with the parents, grandparents, the parties' attorneys, as well as other interested persons, attend hearings and depositions. The undersigned and

his associate have spent well in excess of 204 hours in this matter and costs in the sum of $421.93 which the court can assess a fee and costs against the parties at its discretion.

Respectfully submitted,

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APPENDIX B — EXCERPTS FROM THE RESPONDENT'S BRIEF FILED WITH THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

[page 3] The Court heard from three experts. Dr. Ruth Latterner referred to hereinabove was Court appointed. Dr. Diane Lillesand was called in by the Wife to review test results of the parties and the children on behalf of the Wife, and Dr. Nancy Greenfield who was called in for a like purpose by the Husband.

Both the Husband and Wife were given an MMPI, the results of which should be the same regardless of by whom given. It is graded by computer. (A.III., 44). Dr. Latterner administered the MMPI. Her report of the **Wife** states:

> "Individuals with this profile are often devoid of personality disorder. This individual is apt to be in a category of anxious and fearful personality. People with profiles of this type are often naive and may be lacking in insight. Such individuals tend to make use of defense mechanisms of repression and are unduly conventional and sometimes insecure." (A.I. 1, 2).

Her report of the **Husband's** test, on the other hand, indicated:

> " . . . depicts an individual who responded to test items in a defensive manner and is generally lacking in insight. Persons of the profile tend to be rebellious, immature, irresponsible, egocentric, emotionally unstable, and individuals with this profile are usually associated with deficits with impulse

> control. They are primarily seen as emotionally unstable, passive-aggressive, or to a lesser extent anti-social or narcissistic. A wide variety of acting-out behavior is presented in patients with this profile type. These persons tend to be rebellious toward authority, are impulsive, and are apt to have a history of poor vocational adjustments. These people tend to make good impressions, but after a longer acquaintance their egocentricity becomes apparent. . . . Marital adjustments and difficulties are quite common in individuals with this profile. This is a frequent profile for mothers of problem children." (A.II., 15).

At her January 7, 1993 deposition, Dr. Latterner testified that testing indicated:

> " . . . this profile is encountered in neurotic individuals. . . . Yes, egocentric, emotionally unstable, and almost always seen as character disorders with deficits of impulse control. . . ." (A.III. 47, 48).

Dr. Latterner found the Husband's profile so terrible that she did not want to put everything down in her report for fear that it could influence the Husband and appear that there was no hope for him. She specifically stated:

> "This profile, beyond the mid-20s, this is something that I left out, because I think it is damaging, and I wish nobody knew about it."

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> "Beyond the mid-20s, this is a rather enduring and stable personality pattern that is apt to be quite resistant to any significant change, meaning in psychotherapy. I believe that is true, but I think it is destructive to put it down, because that is like giving up." (A.III., 49).

When asked if it was difficult to change this type of personality after one had reached one's mid-20s, Dr. Latterner responded:

> "Yes, and I think it's probably true, but I don't want to cut off all avenues for this man. I want him to have the opportunity of therapy. I don't like putting this in a report. This says to me to give up, and don't try to change . . . so I left it out of the report, because I think it is damaging to him. I don't think it helps one way or the other in the case. I don't think it is appropriate, but I think it is damaging to him . . . I know you will all read the raw data, which makes me feel good, but I left it out because my bottom line is not just to help the children, I would like to help everyone get themselves together, mentally, in this family. (A.III 49, 50).

Dr. Latterner was asked specifically about this case and about custody and the need of the parties for therapy:

> Q. The mother needs ***two*** units on a scale of 10 of therapy and the father needs ***eight***?

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A. RIGHT. (emphasis added). (A.III. 51, 52).

Dr. Latterner felt that the Husband was ***dysfunctional*** and didn't really have a chance to change. She stated specifically:

> " . . . this is what I saw. I saw a father who needs help, who is dysfunctional, because why give a diagnosis, he is dysfunctional, he has problems, and kids who have big problems." (A.III. 54).

Dr. Latterner stated specifically that the Husband needs therapy (A.III. 57), and the Wife and her Husband (Mr. and Mrs. Kelly) don't need therapy (A.III. 83). ***Dr. Latterner stated that the children should remain with their father only due to her strong feeling of continuity.***

She stated that the children, without being questioned, said they wanted to live with their father (much like Mrs. Pope testified to and stated in her report as referred to on Page 9 herein) as follows:

> "David spontaneously stated, 'I want to live with Dad, not Mom.' He further stated, 'I want to visit Mom and Bob, not all the time. He says, 'Be quiet.' Bob never hit me; he says 'be quiet' . . . sometimes . . . Dad spanks me when I be bad. I say bad words like 'cacca, pee' when I say diarrhea . . .' David indicated that he went to Epcot and had a lot of fun recently, and he said, 'Bobby said he'd

> cut his throat and get hurt . . . ' He further stated, 'Bobby doesn't eat to get fat'." (A. 8)

She referred to this parroting again at Trial. (T 1/20/93, 1180).

The above affirms Bob Kelly's testimony about the childrens' lack of weight gain and that the children weighed approximately 30 lbs. at age 3 1/2 and weighed the same at age 5. (T. 1/20/83). The Wife testified that Bobby didn't want to eat because Daddy said he would get fat. (T. 3/8/93, p. 59). Dr. Latterner referred to Bobby twisting his hair in her report. (A.II 10). Mrs. Pope saw same (Page 8 of this Brief), and reference to same was made in the Appellant's Brief as well at Page 12.

There are numerous references to Bobby's hair problem and to pulling same out and twisting it. Mrs. Pope noted it both in her testimony and in a report stating that Bobby wore a hat to conceal his loss of hair (T. 1/20/93, 39 and A.IV 2). The Wife reported Bobby pulling his hair out a fistful at a time to where he was completely bald on one side of his head. (T. 3/8/93, 46 and 54). The Wife, as well, relates to the story of Bobby pulling his hair out. (T. 3/8/93, 46 and 54) as does Mr. Kelly.

Dr. Latterner also stated in her report:

> "A very positive interaction was noted with both Mr. and Mrs. Kelly. Both boys called mother "Mom" and called step-dad "Bob". (A.II., 13).

When asked by Dr. Latterner to draw something funny, Bobby drew:

Appendix B

> A. A volcano with a house, Daddy's house, and Daddy is in the house with a volcano (T. 1/20/93, 113).

Dr. Lillesand's response to the volcano picture was:

> "My hypothesis, based on this picture, is that a major source of the turmoil lies within the home of the children" — "this child resides in. And the person identified in the picture is Dad. He did not draw a picture of his mother's home this way." (T. 8/11/93, 13).

She stated that the Husband's testing showed psychological problems with poor impulse control, conflict with authority, etc. (T. 8/11/93, 14). She then concluded:

> "Well, my review of this file led me to the conclusion that the children have some really serious emotional problems that need to be addressed and a strong hypothesis that these problems are in some way connected with their father." (T. 8/11/93, 18).

When Dr. Latterner asked as to the pictures as a whole, Dr. Latterner stated:

> A. Yes. They are poorly organized. They have a great deal of disorganized emotion. They are disruptive. They are fearful. There is confusion. (T. 1/20/93, 142).

Dr. Lillesand concurred that it was in the best interests of the

children to be with their mother. She also felt, as quoted by the Appellant in his Brief on Page 9:

> "There is a lot of indication in their drawings that their father is very central to their emotional problems. I'm not going to use, just based on just reviewing the data, the word "cause", but he is very strongly tied up with their fears and their anxieties and their overwhelming emotional distress." (T. 8/11/93, 12-13).
>
> "As if the children's emotional problems appear to be centralized on their home environment and their father, and I would change that." (Words added) (T. 8/11/93, 20).

And continuing, on page 13 thereof with the testimony of Cynthia Lee Anctil Metcalfe (herein referred to as "Cindy Lee", the woman Mr. Metcalfe married after he was divorced for the now Mrs. Kelly):

She talked of the Husband's anger and discipline:

> "It depends on the mood he was in. Towards the end, he was in such a mood, the discipline was spankings. A lot of them during the course of the day. They weren't around that much, so that's basically what they got in the morning and received when they got home.
>
> And on the way home, he would literally stop

> in the middle of traffic, very embarrassing to everybody, get out of the car, take one of them out, and just give them a spanking or threaten to leave them. This is the sad part. I hate to get into this part." (A. __, 13).

She recalled a specific incident as to leaving the child . . . almost:

> " . . . He had stopped the car and he put Bobby out of the car and said okay, now I'm just going to leave you. And he closed the car and he just kind of slowly drove away like to put the fear in him. The child actually thought that the father would leave — I'm yelling, John what are you doing. You're torturing these children. You're also holding up traffic. You're going to get us killed. The child might get hit." (A.V., 15).

Cindy Lee repeated the same type of story on Page 16 of her Affidavit. She told of the Husband letting go of the steering wheel, leaving the children off. She told of that happening several times a week. She told of repeated spankings on Page 17 and of the children running to her for security from their father (Page 18). (A.V., 16-18).